have Zarad as the registered owner of the two machines but also to have the claim of ownership by the respondents endorsed on 6 February 1980. By 9 February 1980 the registration books of the two vehicles were already delivered to the respondents in exchange for the payment of $400,000 on the invoices of Uni-East and Zarad now assumed the responsibility as hirers to pay off the instalments under the hire-purchase agreement.

In the statement of defence the appellants denied that Uni-East was acting as their agents and that the dealers had neither authority nor consent to represent themselves as agents or otherwise of the appellants. Finally it was alleged in the statement of defence that any transfer of ownership if at all was effected unlawfully and was made fraudulently by the respondents or the dealers. The appellants also counterclaimed for general damages for conversion.

It must be appreciated in this case that the learned trial judge had only the evidence adduced on behalf of the respondents and documents which speak for themselves. DW1 had no personal knowledge of what went on in respect of the transaction involving the two machines. It was not disputed that an important official of the appellants involved in the transactions was in fact one Bart Chew who signed the documents P1E and P2E. DW1 also stated that Mr Mah Kim, the financial controller of the appellant company, must also sign the certificate but Mr Mah Kim was not called to give evidence. Another person who should also have first hand knowledge of the transaction was one Mr Lazar Fredericks who was the credit controller of the appellant company at the material time. Mr Lazar Fredericks' duty was to monitor the payments and to chase customers for money in respect of equipment sold by the appellants. He was also not called to give evidence.

No reasons were given why all these persons were not called to give evidence. The learned trial judge invoked s 114(g) of the Evidence Act 1950 against the appellants and we think he was quite correct under the circumstances to do so.

No evidence was adduced by the appellants in the court below to show that the documents tendered were forgeries. Indeed all these documents went into the agreed bundle of documents and no objection was raised at any stage of the proceeding.

The learned judge allowed the claim and dismissed the counterclaim. The surrounding circumstances of this case clearly indicate that the property was intended to pass at time of contract between the respondents and Zarad. It was not disputed that one Zamani (director of Zarad) wanted to raise finance from the respondents on hire-purchase. The documents referred to were handed by Zamani for that reason and to obtain registration. The fact that the documents passed through Uni-East to Colossal to respondents is immaterial.

The appeal is accordingly dismissed with costs. Deposit to respondents to account of taxed costs.

Appeal dismissed.

Solicitors: *Suhaimi Khor Zulkifli & Chang; Khoo & Sidhu.*

Reported by *Prof Ahmad Ibrahim*

Khairul Anuar bin Abu Bakar (An Infant) v Lim Eng Choon

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 149 OF 1984
KC VOHRAH J
23 SEPTEMBER 1990

Tort — Negligence — Road accident — Liability — Failure to anticipate that children's playing could result in accident —Whether additional care should be taken in presence of children

Road Traffic — Negligence — Collision between cyclist and motor cyclist — Liability for damages

Damages (Personal Injury or Death) — Road accident — Injuries to head, face and brain — Impaired sense of smell, slight facial weakness, weakness in hand — Impairment of higher mental faculties — Paralysis of muscle in eye — Epilepsy — General damages — Multiplicand for loss of earning capacity

The infant plaintiff, then aged 12 years, was injured in a road accident when his bicycle collided with the defendant's motor cycle. He claimed damages for personal injuries sustained in the accident. The defendant denied all liability for the accident, claiming that the infant plaintiff had fallen across his path as a result of being pushed. Special damages of $450 were agreed as well as a multiplier of 24. The court was left to deal with the issue of liability, general damages, and the multiplicand for loss of earning capacity.

Held, finding both parties equally liable:

(1) On the evidence, the court had doubts about the infant plaintiff's version of the accident because of inconsistencies in the testimony and in his memory of the events leading to and of the accident. He was hesitant and equivocal in his answers to questions and his demeanour implied that he was not telling the truth.

(2) The defendant's version of the accident was to be believed, but as he had earlier seen the children and that they were pushing at each other, he should have anticipated that they would resume playing as he was overtaking them and that one or both of them could lose balance and fall across his path. He should have given a wider berth to them. The plaintiff had not taken reasonable care of himself. He had failed to appreciate a simple and basic rule of prudence that it was a rash and negligent thing to play on a road which was open to all sundry traffic while cycling. Thus both parties were equally liable for the accident.

(3) Upon considering the nature and extent of the injuries and the authorities, the sum of $60,000 was awarded for pain, suffering and loss of amenities on the basis of full liability. The evidence did not show that the plaintiff required nursing care for his epilepsy, so this was not awarded.

(4) As the multiplier of 24 had been agreed, a multiplicand of $150 for loss of earning capacity was awarded, bearing in mind the plaintiff could still get a job as a shop assistant. A total sum of $43,200 was awarded on the basis of full liability.

(5) Interest on general damages was awarded at 6% from the date of service of the writ to judgment and at 8% thereafter. Special damages of $450 to bear interest at 4% from the date of the accident.

[Bahasa Malaysia summary

Plaintif budak yang pada masa itu berumur 12 tahun telah mengalami kecederaan dalam satu kemalangan jalanraya apabila basikal yang ditunggangnya berlanggar dengan motosikal yang ditunggang oleh defendan. Dia telah menuntut gantirugi untuk kecederaan diri yang dialami dalam kemalangan itu. Defendan telah menafikan sebarang liabiliti untuk kemalangan itu dan mendakwa bahawa plaintif budak itu telah jatuh di hadapan lorongnya akibat ditolak. Gantirugi khas sebanyak $450 telah dipersetujui dan begitu juga dengan pendarab yang ditetapkan pada 24. Mahkamah hanya perlu menyelesaikan isu liabiliti gantirugi am dan angka yang hendak didarab untuk kehilangan keupayaan mendapat upah.

Diputuskan, mendapati kedua-dua pihak sama-sama bertanggung jawab:

(1) Berdasarkan kepada keterangan, mahkamah mempunyai keraguan mengenai cerita kejadian kemalangan yang diberikan oleh plaintif budak memandangkan percanggahan di dalam testimoni dan memorinya mengenai acara yang membawa kepada kemalangan itu. Dia teragak-agak dan tidak pasti di dalam menjawab soalan dan tingkah-lakunya membayangkan bahawa dia tidak bercakap benar.

(2) Cerita kejadian kemalangan yang diberikan oleh defendan boleh dipercayai. Akan tetapi, oleh sebab dia telah ternampak budak-budak itu dan mereka sedang tolak-menolak sesama sendiri, dia harus menjangka bahawa mereka akan terus bermain apabila dia memotong dan kemungkinan salah seorang atau kedua-duanya mungkin jatuh di hadapan lorongnya. Dia sepatutnya telah memberikan jarak yang lebih kepada mereka. Plaintif telah gagal mengambil perhatian yang munasabah untuk dirinya. Dia tidak menghargai satu kaedah kecermatan yang asas serta senang yakni adalah sangat gopoh dan cuai untuk bermain di jalanraya yang digunakan oleh semua kenderaan semasa menunggang basikal. Jadi kedua-dua pihak adalah sama-sama bertanggungjawab untuk kemalangan itu.

(3) Setelah menimbangkan keadaan dan setakat mana kecederaan itu serta autoriti-autoriti jumlah sebanyak $60,000 adalah diberikan untuk kesakitan, penderitaan dan kehilangan kesenangan hidup atas dasar tanggungan penuh. Keterangan tidak menunjukkan bahawa plaintif memerlukan rawatan untuk sawan babinya dan lantaran itu tiada award yang diberikan.

(4) Oleh sebab pendarab sebanyak 24 telah dipersetujui, satu angka yang hendak didarab sebanyak $150 untuk kehilangan keupayaan mendapat upah telah diberikan memadangkan bahawa plaintif masih boleh mendapat perkerjaan sebagai seorang penolong pekedai. Jumlah yang diberi atas tanggungan penuh adalah $43,200.

(5) Faedah atas gantirugi am adalah diberikan pada kadar 6% dari tarikh penyerahan writ sehingga penghakiman dan pada kadar 8% selepas itu. Gantirugi khas pada $450 akan membawa faedah pada kadar 4% dari tarikh kemalangan.]

Cases referred to

1 *Jag Singh* v *Toong Fong Omnibus Co Ltd* [1962] MLJ 78 (refd)
2 *Jag Singh* v *Toong Fong Omnibus Co Ltd* [1962] MLJ 271 (refd)
3 *Marappan & Anor* v *Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 (distd)
4 *Kow Ah Dek & Anor* v *K Ratnasingam* [1981] 2 MLJ 24 (distd)
5 *Tham Yew Heng & Anor* v *Chong Toh Cheng* [1985] 1 MLJ 408 (refd)
6 *Tominam bte Tukimin* v *Toh Kai Chup* [1985] 2 MLJ 345 (refd)

Ramanathan for the plaintiff
Francis Nathar for the defendant.

Cur Adv Vult

KC Vohrah J: This is an action for negligence brought against a motor cyclist by an infant suing by his father and next friend.

It is not disputed that on 17 October 1983 at about 1pm the plaintiff on his bicycle and the defendant on his motor cycle were both proceeding on their proper side of the road in the direction of Jeniang on the Jeniang-Sik road.

The plaintiff was 12 years old then. He said he was cycling towards his home from school when a motor cycle knocked him on his right side. He said he could not remember what actually took place. Under cross-examination he asserted he was cycling close to the edge of the road. And the inference is that the motor cyclist was negligent.

But the motor cyclist, the defendant, said he saw two children in school uniform riding side by side on their bicycles pushing each other. As he tried to overtake them the plaintiff's bicycle which was on the outer side fell to its right after the plaintiff was pushed by his companion. The defendant's motor cycle grazed the handle of the bicycle.

A sketch plan was referred to at the trial. It showed the width of the left side of the road where the accident occurred as about 8½ feet. Otherwise it was not particularly helpful for it merely showed where the investigating officer (who died before the trial) must have found the bicycle and the motor cycle at the scene when he went there. There was no indication of broken glasses, tyre, scratch, or other marks in the sketch from which any conclusive inferences could be made supporting the version of the one or the other as to how the mishap took place.

On considering the evidence, however, I had doubts about the plaintiff's version of the accident. I found it

inconsistent that the plaintiff could have remembered that he was riding close to the left edge of the road and that he was knocked on the right whereas he could not remember, at one stage, and it certainly was an important aspect of the case, whether he was riding abreast of another cyclist. The plaintiff at first said that there was no other school boy cycling in the same direction towards his house but when pressed he said there was no one in front and he said he did not know if there was anyone behind him. He denied riding abreast of another cyclist but when pressed, as stated earlier, he said he could not remember that though, a little later, he denied he and another person were pushing each other on the road whereupon the accident took place. I was mindful of the evidence of the neurosurgeon, PW5, that the plaintiff appeared forgetful as a result of the injuries sustained in the accident when he did some tests on him. But PW5 admitted that the plaintiff could have pretended he was forgetful during the tests. I had opportunity to observe the plaintiff in court as I had the benefit of his details as to what took place on the day of the accident; he said that it was a Monday (and it was), that it was 15 minutes after leaving school when the accident took place, that he was half way home when it took place, that he was close to the left edge of the road when the accident took place, that he was knocked on the right. Yet when it came to an important aspect of the case — as to whether someone else was cycling on the road — he was hesitant in his answers; he was equivocal, as he was when asked about whether he was riding abreast of another cyclist. My distinct impression of the plaintiff, after taking into account his demeanour as well, was that he was not telling the truth.

My view is that the accident took place, on a balance of probabilities, as the defendant described it. He had seen the plaintiff and one other pupil riding side by side and the plaintiff's companion was riding closer to the left edge of the road and the plaintiff was within this boy's touching distance. The defendant was riding at about 50 to 60 kph along a slight bend at that time and he saw them some 100 feet away. The children were being playful and were pushing each other. He tried to overtake them by taking a path very near to the centre white broken line of the road. As he tried to do so the bicycle on the outer side fell to its right. He said it fell because the other cyclist pushed the plaintiff. The defendent said his motor cycle grazed the handle of this bicycle whereupon his motor cycle went out of control.

His story coincided with the story in the police report that he had made at 2.15pm at the police station shortly after the accident. In the report he said that he saw two school children riding abreast and that the cyclist on the outer side suddenly fell to the right side of the road; he tried to avoid the cyclist but grazed the handle of the bicycle. The report did not state that the children were playing but I do not expect a terse report to contain such details bearing in mind that the essence of the report as regards the accident was that the bicycle on the outside suddenly fell and that defendant grazed the handle of this bicycle. There was a discrepancy between his evidence in court where he stated that he first saw the two children cycling 100 feet away and his statement in his report which stated the distance was 100 yards. He said he had mentioned the distance as 100 feet for the report and it was not so taken down. Perhaps it was not taken down properly but the discrepancy is not material in any event.

The width of the left side of the road is about 8½ feet according to the sketch. The defendant estimated that the boy nearer the left edge was cycling about five to six feet from the left edge of the road and said that the two boys were within touching distance. But his testimony that the two children were in the middle of the left side of the road being a recollection relating to spatial proportions in regard to the road is perhaps more accurate than his estimation that the plaintiff's companion was about five to six feet from left edge of road. Now it is not in evidence that just before the defendant decided to overtake the children they were pushing each other. It seems clear though that just shortly before he could overtake, and he was at that time close to the centre white broken line, he saw the plaintiff being pushed and his bicycle falling. It was at that stage of the bicycle falling that the motor cycle grazed the handle of the bicycle. It is a fair inference that had the bicycle not fallen the defendant would have had clear passage through and the accident would have been avoided. But he had earlier seen that the cyclists in front of him were children and they were pushing at each other, and he should have anticipated that they would resume playing as he was overtaking them and that one or both of them could lose balance and fall across his path; and he should have given a wider berth to them. On the other hand the plaintiff was 12 years old and he was in standard 6 and had been regularly cycling to school for the whole period of standard 6 up to October, though while in standard 5 he had occasionally cycled to school. Bearing in mind the principles enunciated in the judgment of Suffian J (as he then was) [*Jag Singh* v *Toong Fong Omnibus Co Ltd*[1]] and also the judgment of the Court of Appeal in *Jag Singh* v *Toong Fong Omnibus Co Ltd*[2] respectively my view is that in the instant case the plaintiff had not in his own interest taken reasonable care of himself; he was aged 12 and in standard 6 and had sufficient discretion cycling to and from school for some time and he failed to appreciate a simple and basic rule of prudence that it was a rash and negligent thing to play on a road which was open to all sundry traffic while cycling. Thus in my view both parties were equally to blame for the accident.

Quantum

The plaintiff was admitted to hospital unconscious and he suffered several soft tissue injuries to the head and face in addition to diffused brain injury, damage to the right temporal lobe and the third cranial nerve. He was in hospital for five weeks in Sungei Petani and in Kuala Lumpur for about three weeks.

Because of the injuries to the brain and the third cranial nerve he appears to suffer from:

(1) impaired sense of smell on left side;
(2) slight left facial weakness;
(3) weakness in left hand;
(4) impairment of higher mental faculties;
(5) third cranial nerve paresis;
(6) post-traumatic epilepsy.

I think there can be no dispute that the first two disabilities are present. As regards weakness of the left hand, and I accept he is left handed, the weakness is not serious — the report of the neurosurgeon states that the weakness is grade 4/5 and that fine and skilled movements like writing are affected.

As regards impairment of higher mental faculties, the consultant neurosurgeon, PW5, said that the plaintiff had suffered a drop in academic performance and that his memory was impaired and that (according to what the father told him) he did not mix with friends. I can accept the doctor's conclusion as regards the drop of academic performance (meaning that he would not be able to complete his secondary education) and that he does not mix with friends but from observation in court and which I have dealt with earlier I am not at all convinced that his memory has been impaired to such an extent that it constitutes a serious disability.

As for the third cranial nerve paresis the consultant opthomologist, PW4, said that the muscle of the right eye is paralysed and there is a drooping of the right upper eyelid and a fixed and dilated pupil in the right eye. According to PW4 the vision itself has not been affected — the optic nerve is intact but the plaintiff has a squint; and he is not able to converge both eyes on a near object and that would make him unable to do close work and reading unless he adjusts to using one eye.

In regard to post-traumatic epilepsy the evidence of the neurosurgeon, PW5, was that medication would be able to control it and that if well controlled by medication it would not interfere with his daily life though certain conditions like stress and lack of sleep might precipitate epileptic attacks. It would not be safe for him to drive. If he goes up heights and develops a fit and falls down he would injure himself. But PW5 said the plaintiff could live by himself and he need not have a companion to look after him unless he has a fit. The neurosurgeon stressed that the plaintiff had to take medication and that if he stops his medication there is a high chance of epilepsy recurring.

In respect of the brain injury and the ensuing loss of amenities the case of *Marappan & Anor* v *Siti Rahmah*[3] was cited as justification for a request of $120,000 as damages for the brain injury suffered by the plaintiff. In that case the accident victim suffered severe head injuries with contusion of the brain and fracture of the right front-parietal bone of the skull resulting in complete paralysis in all four limbs and general damages for pain and suffering and loss of amenities were given at $180,000 on the basis of full liability (she was held 65% liable). But with respect I do not see in our present case the gravity of the brain damages and loss of amenities anywhere approaching the gravity of those in the *Marappan* case.[3]

On the other hand in the case of *Kow Ah Dek & Anor* v *K Ratnasingam*[4] the respondent had various soft tissue injuries, fracture of the nose and swelling of the brain. According to the neurosurgeon the respondent suffered 'minimal brain damage resulting in a considerable change in his behaviour'; he became talkative and full of complaints over small matters; he had lost self confidence and relied greatly upon his sister for material support; he had frequent headaches on the right side and also suffered decreased vision on his right eye; he was unable to apply himself to tasks requiring mental concentration and he had poor memory; he suffered from severe episodes of vertigo and he had fits and dizziness and he wore a collar round his neck. He was awarded $70,000 as damages for pain, suffering and loss of amenities and the Federal Court while holding that the award was on the higher side confirmed the award as it was not shown that the judge who gave the award had wrongly used his discretion in arriving at the figure. In our case the brain injury and the ensuing loss of amenities are less serious than those mentioned in *Kow Ah Dek*.[4]

I think that of more relevance are two Singapore cases. In a 1984 Singapore case, *Tham Yew Heng & Anor* v *Chong Toh Cheng*,[5] Thean J awarded S$35,000 for permanent brain damage to a boy aged nine at the time of the accident and S$3,500 for the fractured maxilla and laceration of the right cheek suffered by the boy. Loss in amenities for the boy were defects in memory and in mental arithmetic.

In another Singapore case, *Tominam bte Tukimin* v *Toh Kai Chup*,[6] Chua J found the plaintiff wholly liable for the accident that she suffered but for completeness Chua J dealt with the question of quantum which was assessed at S$45,000 damages for pain and suffering for brain injury and loss of amenities; the plaintiff, an adult, sustained severe brain injury necessitating emergency surgery to remove blood clots. She also had repair done for a skull defect. She complained of giddiness; walked

unaided but with some difficulty and she had fairly marked difficulty in memory.

Chua J held S$12,000 to be a proper award for epilepsy in addition to the S$45,000 for the brain injury and loss of amenities. The epilepsy suffered by Tominam was considered to be major. In our case the epilepsy is not as serious and it is under control and can be controlled with medication.

Bearing in mind the parameters of the last three cases cited and the slightly less serious nature of the brain injury, the soft tissue injuries and the ensuing loss of amenities including the matter of the epilepsy as compared to those in the last two cases cited, I awarded $60,000 as damages for pain, suffering and loss of amenities. This award is on the basis of full liability.

There was a request for an award for medication for the epilepsy but the evidence shows he received treatment at a General Hospital and that supplies are obtainable from any General Hospital for free. I therefore did not award any sum.

As for the request for an award for nursing care for his epilepsy the evidence is that he does not require any nursing care and I did not award any sum.

For loss of earning capacity the multiplier was agreed at 24 years. What remained was how much the multiplicand should be. Counsel for the plaintiff requested for $200 per month but I agreed with defence counsel that $150 per month is more appropriate bearing in mind that with his disabilities his chances of getting a job as a shop assistant earning $300 to $350 per month are better than his getting a clerical or other job earning about $400 to $500 per month. I therefore awarded $43,200 on the basis of full liability.

The above general damages were awarded at 6% interest from date of service of writ to judgment and 8% thereafter. Special damages were agreed at $450 with interest at 4% from date of accident. I ordered each party to bear its own costs.

Order accordingly.

Solicitors: *Brijnandan Singh Bhar & Co*; *Francis Nathar & Co.*

Reported by *Azra Moiz*

Malakoff Bhd v Kuppusamy & Ors

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 16-07-88
KC VOHRAH J
15 AUGUST 1990

Labour Law — Termination of employment — Allegation of failure to comply with collective employment agreement — Claim for termination benefits — Whether collective agreement was superseded by subsequent award of the Industrial Court in another matter — Employment (Termination and Lay-off Benefits) Regulations 1980, reg 4(1)(a) — Industrial Relations Act 1967, s 17(2)

The appellants, Malakoff Bhd, appealed against the Assistant Director of Labour's award of termination benefits to the 19 respondents whose services had been terminated. On 23 June 1986, the appellants gave the respondents a month's notice of termination on the grounds that the worker had attained or was past the retirement age of 55 years. It was not disputed that the parties had previously been bound by a collective agreement under which the respondents were assured employment until 30 September 1986. It was submitted for the respondents that as there was no clause in the collective agreement relating to age, they were entitled to termination benefits. The appellants argued that the respondents were governed not by the collective agreement but under Industrial Court Award 111 of 1986 (with retrospective effect from 1 September 1984) which stipulated the age of retirement as 55, and as the respondents were retired under this stipulation they were not entitled to termination benefits. When Malakoff Bhd refused to comply with the award, an action was commenced against them resulting in a consent award made in Industrial Court Award 146 of 1987 on 28 April 1987.

Held, dismissing the appeal with costs:

(1) The consent award varied the terms of Award 111 of 1986 such that it would come into effect on 1 April 1987, instead of 1 September 1984 as set out in the award. As such the termination of the employees occurred before the coming into effect of Award 111 of 1986.

(2) The appellants do not deny that they did not apply the articles in Award 111 of 1986 in respect of the estate where the respondents worked after the date of the award, though strangely, the appellants insist they applied the stipulation in the award as regards the retirement age. All the employees were paid according to the terms of the agreement; however, in respect of retirement the appellants relied on Industrial Court Award 111 of 1986.

(3) Award 111 of 1986 which was supposed to have been implemented was not in force; the agreement that was in force and applied to them was the collective agreement which expired under its terms on 30 September 1986 but which continued till 31 March 1987, one day before the consent award came into force, consistent with s 17(2) of the Industrial Relations Act 1967. Thus the agreement was only superseded when Award 111 of 1986 came into effect.

(4) With the agreement being in force on the date of termination, the court failed to see how the appellants could have selectively relied on one stipulation only in regard to the retirement age in the non-applicable Award 111 of 1986 to give termination letters to the 19 respondents. The agreement was silent on the age for retirement and therefore the 19 respondents were entitled to their claim for termination benefits payments.